Office-Supreme Court, U.S.
FILED
JUL 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1538, 80-1934

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

JAMES PLYLER, Superintendent of the Tyler Independent School District and its Board of Trustees, ET AL., AND STATE OF TEXAS *Appellants*

VS.

J. AND R. DOE, as Guardians Ad Litem for I DOE, ET AL., *Appellees*

IN RE ALIEN CHILDREN EDUCATION LITIGATION

STATE OF TEXAS AND TEXAS EDUCATION AGENCY *Appellants*

VS.

UNITED STATES *Intervenor-Appellee*

AND
CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN *Appellees*

On Appeal From The United States Court of Appeals For The Fifth Circuit

---

Brief of Amicus Curiae Texas Association of School Boards In Support of Appellants

---

John S. Aldridge
Attorney for Amicus Curiae
Texas Association of School Boards
406 East 11th Street
P.O. Box 400
Austin, Texas 78767
512/476-9116

Questions Presented

1. Whether aliens unlawfully present in the United States are persons to be afforded the guarantees of the equal protection clause of the fourteenth amendment.

2. If the fourteenth amendment's equal protection clause applies to persons illegally present in the United States, whether a state must provide a tuition-free education to children unlawfully present in the United States.

Parties

The parties are the same, in both cases, as in the court below.

TABLE OF CONTENTS

Questions Presented i

Table of Authorities iii

Interest of Amicus Curiae 4

Summary of Argument 4

Argument 6

I. Adoption of arguments of State of Texas 6

II. The district court below erred in holding that the proper judicial review standard is strict scrutiny 6

A. The statute does not infringe on a fundamental right 7

B. The statute does not create an inherently "suspect class" 8

III. The statute is reasonably related to a legitimate government purpose 10

Conclusion 18

TABLE OF AUTHORITIES

CASES

Boe v. Wright, No. 80-2017 (5th Cir. June 5, 1981)(per curiam) (special concurrence) 13, 15

City of New Orleans v. Dukes, 427 U.S. 297 (1976)(per curiam) 10, 16

DeCanas v. Bica, 424 U.S. 351 (1976)..... 17

Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 49 U.S.L.W. 3824 (May 5, 1981)..... 6, 7, 10, 14

Graham v. Richardson, 403 U.S. 365 (1971) 15

In re Alien Children Education Litigation, 501 F.Supp. 544 (S.D. Tex. 1980), *aff'd.*, No. 80-1807 (5th Cir. Feb. 23, 1981), *appeal granted*, 49 U.S.L.W. 3924 June 16, 1981.....5, 7, 8

Mathews v. Diaz, 426 U.S. 67 (1976) 10, 12, 14

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 7, 8

Shapiro v. Thompson, 394 U.S. 618 (1969)..... 7, 16

United States Department of Agriculture
v. Moreno, 413 U.S. 528 (1973) 10, 15

United States v. Texas, 506 F. Supp.
405 (E.D. Tex. 1981) 14

United States v. Texas,
No. 5281, slip op. (E.D. Tex.
April 17, 1981)..... 14

Vlandis v. Kline, 412 U.S. 441 (1973) 11

CONSTITUTIONS AND STATUTES

TEX. EDUC. CODE §21.031
(Vernon Supp. 1980) 2, 4

U.S. CONST. amend. XIV, §2 2

NO 80-1538, 80-1934

IN THE
Supreme Court of the United States
OCTOBER TERM 1980

JAMES PLYLER, Superintendent of the Tyler Independent School District and its Board of Trustees, ET AL.,
AND
STATE OF TEXAS

VS.

J. AND R. DOE, as Guardians Ad Litem for I. DOE, ET AL.,

IN RE ALIEN CHILDREN EDUCATION LITIGATION

STATE OF TEXAS AND TEXAS EDUCATION AGENCY

VS.

UNITED STATES

AND
CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN

On Appeal From The United States Court of Appeals For The Fifth Circuit

---

Brief of Amicus Curiae

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW the Texas Association of School Boards, by and through their attorney of record, John S. Aldridge, and, pursuant to Rule 36 of the Supreme Court Rules of Procedure, offers herewith its Brief of Amicus Curiae in support of Appellants, the State of Texas and the Texas Education Agency:

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, amendment XIV, §2 states in pertinent part,

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Texas Education Code §21.031 states in its entirety:

> §21.031. Admission
>
> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in

which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

(d) In order for a person under the age of 18 years to establish a residence for the purpose of attending the public free schools separate and apart from his parent, guardian, or other person having lawful control of him under an order of a court, it must be established that his presence in the school district is not for the primary purpose of attending the public free schools. The board of trustees shall be responsible for determining whether an applicant for admission is a resident of the school district for purposes of attending the public schools.

(e) A child placed in foster care by an agency of the state or a political subdivision shall be permitted to attend the public free schools in the district in which the foster parents reside free of any charge to the foster parents or the agency. No durational residence requirement may be used to prohibit such a child from fully participating in any activity sponsored by the school district.

INTEREST OF AMICUS CURIAE

The Texas Association of School Boards is a non-profit organization whose membership consists of over 1,000 school districts in the State of Texas. Its member schools educate 99% of the total elementary and secondary student population in Texas. Active in efforts to represent and assist local school boards throughout the state, the Association seeks to express the interest of its members.

The overwhelming impact of the two cases at bar, relating to the tuition-free education of illegal aliens, compels the Texas Association of School Boards to voice the interests of its members with arguments supplemental to those of the State of Texas and the Texas Education Agency. The permanent injunction prohibiting appellants from enforcement of Texas Education Code §21.031 is of major concern to Association members because they, not the state or its agencies, are the governing bodies that bear the practical consequences of the decisions in the courts below.

All parties to the case have consented to the filing of this Brief of Amicus Curiae.

SUMMARY OF THE ARGUMENT

Texas has passed a statute that provides a tuition-free education to citizens and legally-admitted aliens, all of whom must be residents of the state. TEX.EDUC.CODE ANN. §21.031 (Vernon Supp. 1980). Citizens, legally admitted aliens, and illegal aliens who are not residents of the state must pay tuition to attend Texas public schools.

Too often Section 21.031 has been read in fragments and out of context. This brief, in its section titled, "Consti-

tutional and Statutory Provisions," quotes the entire statute. Read as a whole, it is clear that Texas' intent was to protect itself from becoming the "forum of choice" for out-of-state parents shopping for a superior school district in which to place their children. Many states have similar provisions.

Texas, however, is different. Instead of being surrounded by contiguous states so that only residents of other states are charged tuition, Texas has an open, thousand-mile border with Mexico and almost a thousand miles of coastline accessible to all of Central and South America and the islands of the Caribbean. Accordingly, local school districts are faced with the costs of educating nonresidents not only from adjoining states but also from other countries. This brief of necessity focuses on the demands of Mexican nationals who have illegally entered this country. It is unfortunate that the issue is now so clouded as to obscure the central principle, that a state may, under established precedent, extend the bounty of its educational system to its legal residents at a tuition different from that charged residents of other states and countries.

The Association respectfully submits that, in the event this Court extends the application of the equal protection clause to illegal aliens, the standard of review should be the rational relationship test.

Neither the nature of the affected right nor the resulting classification dictates the use of the strict scrutiny standard in this case, contrary to the opinion in *In re Alien Children Education Litigation*, 501 F.Supp. 544 (S.D. Tex. 1980), *aff'd*, No. 80-1807 (5th Cir. Feb. 23, 1981), *appeal granted*, 49 U.S.L.W. 3924 (June 16, 1981). The

Fifth Circuit, in *Doe v. Plyler*, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 49 U.S.L.W. 3824 (May 5, 1981), erred in finding no rational relationship between the statute, TEX.EDUC.CODE §21.031, and the state's goal of preserving the adequacy of its public schools for the benefit of its residents.

ARGUMENT

I. Adoption of State's Position

The arguments set forth by the State of Texas are hereby adopted by the Association, particularly on the issue of the applicability of the equal protection clause to undocumented aliens.

II. If the equal protection clause applies to undocumented alien children, the district court in *In re Alien Children Education Litigation* erred in holding that the proper judicial review standard is strict scrutiny.

Assuming for purposes of this argument that the equal protection clause does extend to undocumented alien children, the court in *In re Alien Children Education Litigation* erred in applying the strict scrutiny test, rather than the rational basis test, in reviewing Texas Education Code §21.301.

In any equal protection analysis, a reviewing court must utilize the correct standard of judicial review. If the statute in litigation infringes on a fundamental right or creates an inherently suspect classification, the statute is subjected to strict scrutiny, requiring a compelling state interest to justify it. To discharge such a burden the state must demonstrate that its goal or interest is both constitutionally permissible and substantial, and that its use of

the classification is necessary to the accomplishment of its purpose. *Shapiro v. Thompson*, 394 U.S. 618 (1969). In this case, neither a fundamental right nor suspect classification is at issue. The statute need only meet the rational relationship test. Thus if the statute has a legitimate, reasonable purpose it should be upheld.

A. The statute does not infringe upon a fundamental right.

Education is not classified as a fundamental interest sufficient to invoke strict scrutiny under the equal protection clause. This Court has said: "Education, of course, is not among the rights afforded explicit protection under our federal constitution. Nor do we find any basis for saying that it is implicitly so protected." *San Antonio I.S.D. v. Rodriguez*, 411 U.S. 1, 35 (1973); *Doe v. Plyler*, 628 F.2d at 463. To continue to argue that education is a fundamental right, after the *Rodriguez* decision, is counter to established legal precedent.

Despite the clarity of this Court's statement that education is not an explicit or implicit constitutional right, the *In re Alien Children* court held that a never-before-recognized "access" to education *is* fundamental. To reach that conclusion, the lower court reasoned that a sufficient nexus exists between education and the freedoms of speech and suffrage. The court stated that the right to an education becomes fundamental when it preserves or is substantially related to other basic civil and political rights guaranteed by the Constitution. 501 F.Supp. at 571. The same argument was considered and rejected by this Court in *Rodriguez*. 411 U.S. at 30-40. The exhaustive analysis of the Court need not be restated; suffice it to say that those arguments were found to be

unpersuasive. More important, the Court treated education as a legislative classification involving economic and social policy not subject to strict judicial review. As such, it was "a particularly inappropriate case in which to subject state action to strict judicial scrutiny." *Rodriguez,* 411 U.S. at 38.

B. The statute does not create an inherently "suspect classification."

While *Rodriguez* conclusively lays to rest any argument that education is a fundamental interest, it also notes the possibility that an education system made available by the State only to those able to pay tuition could create a clearly defined class of "poor" people precluded from receiving an education; such a system might well be subject to strict scrutiny. *San Antonio I.S.D. v. Rodriguez,* 411 U.S. at 24 n. 60.

In any event, all such examinations rely upon the false premise that illegal alien children are absolutely deprived of education. The *In re Alien Children* court, in Note 17 of its opinion, found that 72.9% of the random sample of districts responding to a survey would either require payment of tuition or exclude undocumented alien children. 501 F.Supp. at 555. This statistic misleads because it is based upon only 29 of the more than 1,100 school districts in Texas and because it groups both exclusion and admission with tuition under the same response. Furthermore, it fails to distinguish among school districts according to the number of students they could expect to enroll.

The "class" of poor students is improperly established because the statute requires tuition of *all* out-of-state students, be they Mexican nationals, Germans, Australians,

or even Pennsylvanians, Tennesseans, or Californians. Residency, not poverty, establishes the class. Respondents do a disservice by adopting a stereotype that all Mexican nationals are impoverished supplicants, ignoring that proud country's historical position as the Spanish colonial capital for the development of Central and South America. Americans too often forget that the development of the Northern hemisphere had its counterpart in the Spanish development of the Southern hemisphere and the Southwestern United States.

As recognized by the Fifth Circuit in *Doe v. Plyler*, no "suspect class," namely alienage, is at issue. Mere alienage is not the basis of the statute's classification of those eligible for tuition-free education. The Fifth Circuit correctly concluded that the state of Texas has differentiated between, on the one hand, school age citizens and lawful aliens residing in Texas, and on the other hand, everyone else, which includes aliens illegally residing in Texas and all other persons who are not residents. Aliens as a group are not subjected to tuition.

In a recent opinion, this Court, addressing denial of Medicare supplemental insurance payments to aliens "unless they have been admitted for permanent residence and also have resided in the United States for at least five years," upheld the statute on the rational basis standard, refusing to apply strict scrutiny. The Court found it reasonable to classify persons based on some durational residency requirement, at the minimum.

> "But if these requirements were eliminated, surely Congress would at least require that the alien's entry be lawful; even then, unless mere transients are to be held constitutionally

> entitled to benefits, *some* durational requirement would certainly be appropriate."

Mathews v. Diaz, 426 U.S. 67, 82 (1976). Strict scrutiny is not the proper judicial review standard to be applied in the case at bar.

III. The statute is reasonably related to a legitimate government purpose.

If the equal protection clause applies to undocumented alien children, the state has shown that the classification rationally furthers the state's purpose in enacting the statute. The Fifth Circuit opinion in *Doe v. Plyler* virtually ignored not only the reasons for promulgating the statute but also the fact that the rational basis test presumes a statutory classification to be constitutional. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976)(per curiam). Traditionally, if a statutory classification is rationally related to a legitimate governmental function, it will probably be sustained. *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). The Fifth Circuit erred in finding no rational relationship in this case.

A major reason for the statute's existence has become more apparent in recent years with the influx of illegal aliens into this country. The state legislature recognized the quandary of local school districts contending with, on the one hand, inflation, employee demands for higher salaries, and overall increased costs, and on the other hand, failure of school bond elections, demands for high standards, and insistence upon better schools. Perplexed by a combination of all these factors, local schools have borne the brunt of the criticism of public education.

Among the efforts to help maintain adequate schools without adversely affecting the state's residents was the measure now known as Education Code §21.031. To be sure, one state interest in the statute is a monetary one. The state and local boards are attempting to preserve an adequate school system for its residents in the least burdensome manner possible—by charging tuition to those students who are nonresidents, and who, in many cases, have no intention of remaining in this country.

The right for a state government to establish reasonable criteria for state residency status for tuition purposes has been recognized by this Court in *Vlandis v. Kline*, 412 U.S. 441 (1973). *Vlandis* established the permissibility of preventing students who were not bona fide residents of a state, but who resided there solely for educational purposes, from taking advantage of in-state rates. This Court in *Vlandis* defined residence as "... the domicile of an individual [which] is his true, fixed, and permanent home and place of habitation. It is the place to which whenever he is absent, he has the intention of returning." 412 U.S. at 454.

We all recognize that the state has a limited amount of funds available for education for its citizens and under *Vlandis* can set reasonable tuition requirements for nonresidents. We also recognize, under the authority of *Mathews v. Diaz*, that the equal protection clause allows reasonable restrictions related to whether an alien is a permanent resident:

> [S]urely Congress would at least require that the alien's entry be lawful; even then, unless mere transients are to be held constitutionally entitled to benefits, *some* durational require-

> ments would certainly be appropriate. In short, it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence. . . . [N]either requirement is wholly irrational. . . . We may also assume that unnecessary hardship is incurred by persons just short of qualifying. But it remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences, and, of greatest importance, that those who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity with the United States than those who do not. In short, citizens and those who are most like citizens qualify. Those who are less like citizens do not qualify.

426 U.S. at 83-84.

Examined objectively, the statute in its present form extends an education to all students residing in the state. The district court in *In re Alien Children* found that only 10% of the undocumented persons in this country remain here as permanent residents. School districts recognize the need to educate the children of those intending to remain and become citizens. However, the state has a right to make reasonable distinctions so as not to assume educational costs of the approximately 90% of the illegal aliens who do not intend to remain in this country. It is undisputed that the overwhelming majority of illegal aliens in Texas are here for limited employment purposes with the intent of returning to their home countries. Under *Vlandis*, requiring such nonresidents to pay tuition is a permissible state action.

The statute does not prohibit school districts from enrolling the illegal alien children but simply withholds state funding for those students. Local schools are free to accept illegal aliens under the statute, with or without tuition. The Dallas Independent School District, for example, now faces enrollment of between 2,000 and 5,000 illegal alien children from Mexico. *Doe v. Wright*, No. 80-2017 (5th Cir. June 5, 1981) (per curiam)(special concurrence). Outlying districts, however, have for several years enrolled the students because their small numbers do not pose serious local difficulties to their generally financially stable school districts.

In an attempt to give the widest possible reading of what constitutes a "resident" or a legally admitted alien, the state prepared a proposed amendment to its State Board of Education Administrative Procedures, Administrative Procedure 51.01, *Student attendance allowed.* That policy lists a number of recognized immigration forms that aliens may possess and states that "any other document recognized by the United States Government," is acceptable. The form concludes that ". . . nothing herein shall prohibit any local school district from accepting any student on a basis of tuition charges *or costs paid by the local district*" (emphasis added). These proposed procedures were sent to all school districts on March 6, 1980 by Alton Bowen, Commissioner of Education. Those aliens who have complied with minimal federal guidelines, even though entering illegally, seeking federal protection under the "Silva letters," are thus subject to state funding under the guidelines set forth by the Commissioner of Education. It is actually a very small percentage of alien entrants who, in the language of this Court, cannot advance "even a colorable constitutional claim to a share in the bounty that a conscientious sover-

eign makes available to its own citizens and *some* of its guests." *Mathews v. Diaz*, 427 U.S. at 80.

Besides having a statewide effect, the courts' invalidation of the statute presents a problem of another sort, albeit related to fiscal implications, to local schools. Even with state funding for educating local children, school districts are seriously strained, particularly in the area of bilingual education. Already the state is under federal court order to dramatically upgrade bilingual education facilities. In *United States v. Texas*, 506 F.Supp. 405 (E.D. Texas, 1981), a massive bilingual program for grades kindergarten through twelve was ordered because of the finding that "the state's existing bilingual program, while an improvement over past practices, is wholly inadequate." 506 F.Supp. at 428. This ruling came after considering only the problems in educating Texas residents with limited English proficiency. By the year 1987, by court order, "each student entitled to bilingual instruction will be provided a program of such instruction in all regularly offered academic subjects or subject areas with the exception of art, music, physical education ..." *United States v. Texas*, No. 5281, slip op. at 3 (E.D.Tex. April 17, 1981). Adding children in need of even more intensive bilingual programming to the overall educational system will undoubtedly create an even greater shortage of qualified bilingual teachers and appropriate materials.

The main justification for the statute revolves around fiscal considerations, both state and local. The court in *Doe* stated that cost could not justify the exclusion of any group of people from any government program that requires funding. 628 F.2d at 459. The special concurrence in *Boe v. Wright* states that the *Doe* "panel's state-

ment is too broad. Cost of a government funded program is a legitimate governmental interest. A challenged classification will be sustained if it rationally furthers such a legitimate governmental interest." *Boe v. Wright*, slip op. at 2 (special concurrence).

The cases cited in *Doe v. Plyler* do not stand for this proposition in the context of a rational relationship review under the equal protection analysis. For example, *United States Department of Agriculture v. Moreno* involved not fiscal considerations but rather a statute whose legislative history indicated that the legislative desire was to purposefully discriminate against an unpopular group, "hippies." Independent, legitimate government interests were notably absent.

In the other two cases cited in *Doe* for the conclusion that cost cannot be a rational reason for a classification, the Court was applying a strict scrutiny test, inappropriate in a rational basis analysis. As distinguished in the special concurrence in the Fifth Circuit's *Boe v. Wright* opinion:

> In *Graham* [*v. Richardson*, 403 U.S. 365 (1971)], the Court held that the states had a legitimate governmental interest in preserving the fiscal integrity of their welfare programs and that they can legitimately attempt to limit expenditures on these programs. But the Court held that the states cannot accomplish such a purpose by invidious discrimination because the challenged classifications (excluding lawfully admitted resident aliens from welfare assistance) were inherently suspect. 403 U.S. at 371-76.

> In *Shapiro* [*v. Thompson*, 394 U.S. 618 (1969)], the Supreme Court applied the compelling state interest test and held unconstitutional a state classification that imposed a one-year waiting period before new residents could become eligible for public welfare assistance. The Court recognized that a state has a legitimate interest in attempting to limit its expenditures on welfare assistance, but that the state's classification was invidious because it impinged on the fundamental right of interstate travel without promoting a compelling state interest. 394 U.S. at 633, 638 . . . . Therefore, it is clear that cost, in and of itself, can justify a classification if a rational basis exists for it — assuming that no constitutionally impermissible state objective exists.

Boe v. Wright, slip op. at n.3.

Asserting that Texas should have attacked the illegal alien problem by passing a statute that would prohibit employment of illegal aliens, the *Doe* panel substituted its judgment for that of the state legislature. The "exclusionary motive," i.e., discouraging illegal immigration to this state by denying free education to illegal aliens, was attacked in *Doe* because of the state's failure to enact such an employment statute. Clearly, sitting as a "superlegislature" is inappropriate for a federal court. The state may have overlooked one remedy or many remedies, but its failure or inability to ameliorate all perceived evils does not per se invalidate its permissible and reasonable legislative actions. *City of New Orleans v. Dukes*. "[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determina-

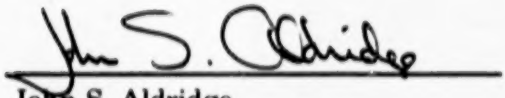
tions made in areas that neither affect fundamental rights nor proceed along suspect lines." 427 U.S. at 304.

No fundamental right is affected and no suspect class is involved. The state has demonstrated ample basis to determine that there is a rational reason for its decision to exclude undocumented aliens from tuition-free state-funded education. The state's police power includes the authority to regulate employment, health and safety, and education. It maintains a significant interest in the welfare of its own residents; in keeping with that interest, the state must preserve, as best it can, the quality of education for its students. This Court has shown in *DeCanas v. Bica,* 424 U.S. 351 (1976), that a state's regulation "of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of such police power regulation." 424 U.S. at 357. The Court pointed to both protection of a lawfully resident labor force and fiscal considerations as adequate justifications for a statute prohibiting employment of illegal aliens. At this time, it is necessary for the state of Texas to regulate education in areas where education of all illegal immigrants would have an adverse impact both on the education of lawful resident children and fiscal funding.

CONCLUSION

For the foregoing reasons, the Texas Association of School Boards respectfully requests reversal of the rulings below. In addition, it requests an order to vacate the trial courts' permanent injunctions against implementation of Texas Education Code 21.031 (a)-(c).

Dated July 30, 1981 and respectfully submitted,



John S. Aldridge
Texas Association of School Boards
P. O. Box 400
Austin, Texas 78767
512/476-9116